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No. 83-1606

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN B. KENNEDY,

Petitioner

v.

THE BOARD ON PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF DELAWARE and THE SUPREME COURT OF DELAWARE,

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of Delaware

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Since the date on which we delivered our Brief for Respondents to the printer (that Brief was mailed to the Clerk of the Court and to the petitioner by certified mail on April 27, 1984) there have been three developments which we feel should be brought to the attention of the Court:

1. On April 27, 1984, the United States District Court for the District of Delaware, following a hearing on an order to show cause why the imposition of identical discipline on the petitioner in this case (John B. Kennedy) should not be imposed, issued an Opinion considering each of the arguments made by John B. Kennedy and agreeing with the Opinion of the Delaware Supreme Court. A copy of that Opinion and the Order issued pursuant to it is attached as Appendix A.

2. On April 24, 1984, the Supreme Court of Delaware mailed out corrected pages 1, 7, 14, 19 and 30 in the John B. Kennedy Opinion. A copy of the letter of transmittal, and the corrected pages are attached hereto as Appendix B. It appears all changes are purely typographical in nature.

3. There has now come to our attention the recently reported decision *Matter of Felmeister*, 95 N.J. 431, 471 A.2d 775 (1984). In that case the Court was considering whether or not discipline was appropriate for the intentional violation of a Court Rule. The respondents there had argued that the Rule (which related to advertising) was unconstitutional and therefore they should not be disciplined. The argument was thus similar to the argument made by petitioner Kennedy in this case who argues that the discovery rules issued by the Delaware Supreme Court are unconstitutional because they do not provide full reciprocity, and therefore he should not be disciplined for having wilfully disregarded them. In commenting on that situation the New Jersey Supreme Court stated:

> Respondents, however, chose not to seek a declaratory judgment but to violate the mandate of the Court. Despite being fully aware of the Rule and its meaning, the respondents intentionally violated it. *Cf. In re Hinds*, 90 N.J. 604, 630-31, 449 A.2d 483 (1982) (where the conduct proscribed by the Rule, which involved political as distinguished from commercial speech, was ambiguous and the disciplinary restriction was not expressly brought to the attention of the attorney before his conduct occurred). We do not view their actions as being substantially different from those of individuals who violate a court order and then seek to raise the unconstitutionality of the injunction as a defense to prosecution for the violation. Unconstitutionality is not a defense. For example, in *Walker v. Birmingham*, 388 U.S. 307, 320, 87

> S.Ct. 1824, 1831, 18 L.Ed.2d 1210, 1219 (1967), the Supreme Court upheld the conviction of civil rights demonstrators for violating an *ex parte* injunction issued to enforce an ordinance prohibiting parading or demonstrating without a license. The Supreme Court held that the ordinance's unconstitutionality was unavailable as a defense. The Court stressed that the defendants knowingly had failed to pursue available judicial remedies and upheld their criminal convictions, stating that, 'in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives***. [R]espect for judicial process is a small price to pay for the civilizing hand of law***.' *Id.* at 320-21, 87 S.Ct. at 1831-32, 18 L.Ed.2d at 1219-20 (footnote omitted) *See generally* Blasi, 'Prior Restraints on Demonstrations,' 68 *Mich.L.Rev.* 1481, 1536-52 (1970) (discussing judicial review of restraints on political speech).

95 N.J. at ____, 471 A.2d at 782-783.

CONCLUSION

For the reasons advanced in the Brief of Respondents, and in the materials submitted in this Supplemental Brief for Respondents, we urge the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: May 15, 1984

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In the Matter of:	:	
	:	
JOHN B. KENNEDY,	:	Misc. No. 84-21
	:	
Respondent	:	

Samuel C. Stretton, Esquire, West Chester, Pennsylvania, Attorney for Respondent.

O. Francis Biondi, Esquire, Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, and

Walter S. Rowland, Esquire, Hercules, Inc., Wilmington, Delaware, and

F. Alton Tybout, Esquire, Tybout, Redfearn, Casarino & Pell, Wilmington, Delaware, for the Board of Professional Responsibility

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OPINION

Wilmington, Delaware
April 27, 1984

STAPLETON, *Chief Judge:*

This Court has received a certified copy of an Order of the Supreme Court of the State of Delaware, dated January 24, 1984, which temporarily suspends John B. Kennedy, Esquire from the practice of the law in the State of Delaware for a period of two years commencing January 24, 1984. A final mandate was entered by the Supreme Court of the State of Delaware on February 9, 1984. On February 16, 1984 this Court issued, pursuant to Local Rule 8.2B, an order to show cause why the im-

position of identical discipline by this Court would be unwarranted.

Local Rule 8.2B provides in pertinent part as follows:

8.2 DISCIPLINE IMPOSED BY OTHER COURTS

* * *

(2) Upon the filing of a certified or exemplified copy of a judgment or order demonstrating that any attorney admitted to practice before this Court has been disciplined by another court, this Court shall forthwith issue a notice directed to the attorney containing:

(a) a copy of the judgment or order from the other court; and

(b) an order to show cause directing that the attorney inform this Court within 30 days after service of that order upon the attorney, personally or by mail, of any claim by the attorney predicated upon the grounds set forth in (4) hereof that the imposition of the identical discipline by the Court would be unwarranted and the reasons therefor.

(3) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this Court shall be deferred until such stay expires.

(4) Upon expiration of 30 days from service of the notice issued pursuant to the provisions of (2) above, this Court shall impose the identical discipline unless the respondent-attorney demonstrates, or this Court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

(a) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject; or

(c) that the imposition of the same discipline by this Court would result in grave injustice; or

(d) that the misconduct established is deemed by this Court to warrant substantially different discipline.

Where this Court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

(5) In all other respects, a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this Court.

(6) This Court may at any stage appoint counsel to prosecute the disciplinary proceedings.

On March 4, 1984, Mr. Kennedy, through counsel, filed Respondent's Motion in Opposition to the Imposition of Identical Discipline and Request for a Hearing. Shortly thereafter, this Court appointed three attorneys to prosecute these disciplinary proceedings pursuant to Local 8.2B(6). After the record in the State Court proceedings had been obtained and filed with this Court, an oral argument on respondent's motion was held on April 11, 1984.

Respondent makes ten arguments in support of his position that it is inappropriate to impose an identical sanction. Each of these arguments was advanced before the Supreme Court of Delaware and was given careful and thorough consideration by that tribunal as reflected in the attached copy of the opinion for that Court authored by Justice McNeilly. I agree with the conclusions

reached in that opinion and offer the following solely by way of supplemental comment.

The facts found in the State disciplinary proceedings are set forth on pages 2-16 of the Supreme Court's opinion. Since I find no fault with the State proceedings, I accept these findings of fact.

I.

Respondent's initial argument is that he was denied the right to due process by the commingling of the investigative, prosecutorial, and adjudicative functions of the Censor Committee.[1] I agree with and adopt the Delaware Supreme Court's analysis of these contentions and its conclusions. (*See* Slip Op. pp. 16-21). The emphasis placed in this Court on two arguments in this area causes me to make only two additional comments. It does not offend due process for a member of a Censor Committee, after it has reached a decision on a recommendation to the Supreme Court, to urge adoption of that decision before that Court. It is difficult to see how there could be any effect adverse to a respondent from such a procedure. Nor does it offend due process for the Committee to hear the results of an investigation without the respondent being present for the purpose of deciding whether there should be a formal proceeding. *Withrow v. Larkin*, 421 U.S. 35 (1975).

II.

Respondent's second contention is that the introduction of hearsay evidence before the Committee violated his right to due process. I agree with and adopt the Delaware Supreme Court's analysis of this contention and its conclusion with respect thereto. (*See* Slip Op. pp. 21-23). While reliance upon some forms of hearsay evi-

1. Since it (sic) proceedings in these matters, the Censor Committee has been renamed the Board of Professional Responsibility and is sometimes referred to by that title in the record before the Delaware Supreme Court.

dence in an attorney disciplinary proceeding might violate due process in some circumstances, respondent points to no evidence allegedly admitted in error which played a material role in the findings against him.

III.

Respondent next challenges on grounds of vagueness Disciplinary Rule 2-106 which relates to the charging of excessive fees. I agree with and adopt the analysis of the Delaware Supreme Court and its conclusions with respect to this contention. (*See* Slip Op. pp. 23-26)

IV.

A denial of an application for a continuance provides the basis for respondent's fourth attack. The denial of this application allegedly deprived respondent of his rights to counsel, to confront witnesses, and to a fair trial in Case No. 60, 1983. I agree with and adopt the analysis of the Supreme Court of Delaware and its conclusion with respect to this contention. (*See* Slip Op. pp. 27-29).

V.

In Matter 75, 1983, respondent contends that he was denied due process by the failure to give him notice that the charges set forth in a rule to show cause why respondent should not be held in contempt were also claimed to be disciplinary violations. Respondent asserts that being notified that one is charged with civil contempt is not the equivalent of being notified that one is charged with disciplinary violations since the former charge, if sustained, can be cured by compliance — in this instance, by supplying the information and documents called for in the Censor Committee's interrogatories and subpoenas. For present purposes, I accept the validity of this assertion. This does not aid re-

spondent, however. The Censor Committee in Matter 75, 1983 recommended coersive discipline for a contempt of court. Specifically, it recommended:

> . . . [T]hat the appropriate order finding respondent in contempt be modeled after that in *Delaware State Bar Association v. Alexander*, Del. Supr., 386 A.2d 652, 664 (1978) [five months imprisonment suspended on condition that the defendant comply with a contemporaneously entered injunction]. The purpose of such a remedial order of contempt imposing a sanction of imprisonment on respondent is to insure his compliance with the process of the Board in a *timely* fashion. Bd. Prof. Resp. Answering Br. in Support of its Report, p. 8.

The Delaware Supreme Court expressly pointed out that the Committee's Final Report "recommends discipline for a finding of contempt . . . in failing to answer subpoenas and interrogatories [and was not] a recommendation for discipline based upon a finding of a disciplinary violation . . . ." (Slip Op. pp. 29-30). The Supreme Court did not accept the recommendation of the Censor Committee, however.

When discussing the appropriate action to be taken, the Court expressly distinguished between contempt proceedings and disciplinary proceedings "designed to focus on the protection of the public from lawyers whose conduct falls below that prescribed by the Code of Professional Responsibility." (Slip Op. p. 33). The Court nonetheless concluded that all of respondent's conduct as a member of the Bar, including contemptuous acts, should be taken into account in determining the appropriate discipline to impose. Thus, the Court stated:

> [I]t is difficult to conclude that those instances which involve contemptuous acts do not call into question the fitness of Kennedy to practice law. Therefore, we weigh them equally along with the

other types regardless of the contempt sanctions (or lack thereof) already imposed.

Thus, this case does not pose the issue of whether a suspension could have been imposed in Matter 75, 1983 if it had stood alone. Rather it poses the issue of whether a court in a disciplinary proceeding may consider contemptuous conduct by the respondent not constituting a disciplinary violation in determining the appropriate disciplinary sanction for other conduct which does violate the Code. I conclude that the due process clause does not foreclose a court from this approach.

VI.

Next, respondent insists that Discovery Rule DR 1-103 and related Censor Committee rules violate due process because they do not allow for reciprocity of discovery and, in effect, shift the burden of proof to the respondent.

Censor Committee Rule 8 provides that "the Committee may require any member of the Bar to answer written interrogatories propounded by it relevant to any matter which is the subject of an investigation or a preliminary or formal hearing." Rule 5 allows the Board to issue subpoenas as a part of its investigation. While respondent, like the Committee, has the right to issue subpoenas to compel the testimony of witnesses at the hearing and the production of documents, the only pre-hearing discovery rule applicable to the respondent provides that he or she can compel "the testimony of a witness residing outside the state by deposition or otherwise."

The Committee's right to pre-hearing discovery is limited by Rule 5 which provides that the respondent may seek a protective order with respect to interrogatories or subpoenas issued in the course of the investigation.

In support of the proposition that these rules violate due process, respondent relies upon *Wardius v. Oregon*, 412 U.S. 470 (1973) in which the Supreme Court struck down an Oregon statute which required the defendant in a criminal case to notify the prosecution of, and provide information with respect to, an alibi defense but which provided for no reciprocal discovery from the prosecution. The Court there observed:

> Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but cf. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, it does speak to the balance of forces between the accused and his accuser. . . . But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Id.* P. 2212

I think it self-evident that the Censor Committee could not do its job effectively without the authority to pursue its investigations and case development through compulsory process. It is not self-evident that the state has a compelling interest in providing such compulsory process to investigators while denying it to the respondent at the pre-hearing stage. Nonetheless, I do not consider the *Wardius* case to be apposite.

First, this is not a criminal case and while respondent has a great deal at stake, that is not unusual in many forms of administrative proceedings. It does not, in my judgment, violate due process for an agency to have compulsory process for the purpose of an administrative

investigation even though other interested parties are not entitled to pre-hearing discovery.

Second, denial of pre-hearing discovery rights to respondents in this context does not involve the same kind of unfairness inherent in Oregon's statute. The nature of an attorney disciplinary proceeding is such that it necessarily arises out of some professional relationship which the respondent has had in the past. Accordingly, it is ordinarily not difficult for a respondent to prepare any defense he or she may have for a disciplinary hearing and it is very rare that the investigator's case will involve significant surprise.

The Censor Committee discovery rules do not provide a reason for failing to impose identical sanctions.

VII.

Respondent's seventh argument is that he was denied due process and equal protection in Matter 75, 1983 by the appointment of a special prosecutor. I agree with and adopt the analysis of the Delaware Supreme Court and its conclusion with regard to this contention. (*See* Slip Op. p. 21, including footnote 7).

VIII.

Respondent next complains that once he was found in violation of the charged disciplinary rules he should have had the opportunity to present evidence as to the nature of the discipline to be imposed. Respondent had the opportunity to present such evidence at the hearing before the Censor Committee, however, and I know of no authority which requires a two hearing approach in this context.

IX.

In Matter 75, 1983 the respondent contends that discipline was not warranted since at all pertinent times

the respondent, on advice of counsel, was making a good faith challenge to the rules. I agree with and adopt the analysis and conclusion of the Delaware Supreme Court with respect to this issue. (*See* Slip Op. p. 30).

X.

Finally, respondent contends that the evidence was insufficient to support the findings in Nos. 60, 204 and 205 of 1983. I conclude that there was ample evidence to support those findings.

XI.

This Court will impose sanctions identical to those imposed by the Supreme Court of the State of Delaware.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In the Matter of:	:	
	:	
JOHN B. KENNEDY,	:	Misc. No. 84-21
	:	
Respondent	:	

ORDER

THIS 27th day of April, 1984, for the reasons set forth in this Court's Opinion of this date,

IT IS ORDERED that John B. Kennedy, Esquire is hereby suspended from the practice of law before this Court for a two year period commencing April 27, 1984.

/s/ WALTER K. STAPLETON
United States District Judge

B-1

SUPREME COURT OF DELAWARE

MEMORANDUM

FROM: JUSTICE McNEILLY

April 24, 1984

All Justices
O. Francis Biondi, Esq.
Walter S. Rowland, Esq.
Samuel C. Stretton, Esq.
Loren Myers, Clerk
Steve Taylor, Deputy Chief Clerk

Please substitute the enclosed corrected pages 1, 7, 14, 19 and 30 in the John B. Kennedy Opinion sent to you on January 24, 1984. Thanks.

encls.

JM

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE:

JOHN B. KENNEDY, Esquire,	§	Nos. 204 &
a member of the Bar of	§	205, 1982
the Supreme Court of the	§	Nos. 60 &
State of Delaware.	§	75, 1983

Submitted (Nos. 204 & 205, 1982) : April 11, 1983*
Submitted (Nos. 60 & 75, 1983) : October 17, 1983
Decided : January 24, 1984

Before MCNEILLY, HORSEY AND MOORE, Justices.

Proceeding upon Final Reports of the Board on Professional Responsibility.

O. Francis Biondi (argued), Wilmington, for the Board on Professional Responsibility as to Nos. 204, 1982 and 60, 1983.

F. Alton Tybout (argued), Wilmington, for the Board on Professional Responsibility as to No. 205, 1982.

Walter S. Rowland (argued), Wilmington, for the Board on Professional Responsibility as to No. 75, 1983.

Samuel C. Stretton (argued), West Chester, Pennsylvania, for the respondent.

MCNEILLY, *Justice:*

* Issuance of a decision in Nos. 204 and 205, 1982, submitted on April 11, 1983 was deferred until this time in order for the Court to address the common issues of law raised in Nos. 60 and 75, 1983, submitted on October 17, 1983.

which was exactly one-half of Mr. Book's entitlement. Mr. Kennedy explained that a portion of the check was taken to pay for the orthopedic examination and report. On September 2, 1980, Mr. Book went to Mr. Kennedy's office to pick up an additional disability check. The check again was in the amount of $83.08, one-half of Mr. Book's entitlement. Mr. Kennedy then informed Mr. Book that there was no mistake because he would be taking fifty percent (50%) of the temporary total disability check as legal fees. Testimony revealed that Mr. Kennedy had altered the prior "contingent fee agreement" because Mr. Book could not advance costs. Mr. Kennedy increased the contingent fee from forty percent (40%) to fifty percent (50%) and stated he would cover the costs of the litigation in exchange for the increase in the contingent fee.

4. Mr. Elder of Aetna testified that Mr. Kennedy's imput in two telephone calls to the company had no affect "sic" on the company's decision to pay temporary total. Aetna never challenged nor disputed Mr. Book's right to temporary total payments. Based on the statements of Mr. Book's employer, Gilpin, and the insurance carrier, we find there was never a dispute over compensation for temporary total disability under the Workman's Compensation statute. We further find that in addition to the contingent fee arrangement entered into between Mr. Book and Mr. Kennedy, Mr. Kennedy charged $10 per consultation on each of two separate occasions. We further find that an additional $100 was delivered by Mr. Book to Mr. Kennedy upon his second visit to Mr. Kennedy for consultation obstensibly for physician's fees.

5. Testimony of Morton Kimmel, an experienced Workman's Compensation plaintiff 's attorney, established a standard in the community whereby practice in New Castle County of attorneys experienced in temporary total disability claims is to charge no fee where there is no dispute and no litigation on a temporary total issue. Further, the practice generally is to conform to the Board's

On March 1, 1983, the Board issued the following Final Report recommending that Kennedy be disciplined for his failure to respond to subpoenas issued and interrogatories directed to him by the Board in eleven (11) proceedings pending before the Board charging Kennedy with professional misconduct.

(No. 75, 1983)

1. The following constitutes the Board's findings of fact:

The Respondent was served subpoenas and interrogatories pursuant to Rules 8 and 13 of the Rules of the Board of Professional Responsibility[4]

3.(continued)
a tribunal, a lawyer shall not:

* * *

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

DR1-102(A)(5)
A lawyer shall not:

* * *

(5) Engage in conduct that is prejudicial to the administration of justice.

4. Rule 8 of the Board on Professional Responsibility states that "[t]he Board may require any member of the Bar to answer written interrogatories propounded by it relevant to any matter which is the subject of an investigation or a preliminary or formal hearing."

Rule 13 provides for the issuance of "[s]ubpoenas for the attendance of witnesses and the production of books and records . . . "and" may, in the alternative, require the person to whom it is directed to make written answer to written interrogatories to be attached thereto."

upon matters under preliminary investigation as follows:

Case No. 795 Sadie M. Smith
Served July 12, 1982
Case No. 806 Josephine Smith
Served July 12, 1982
Case No. 807 Louis F. Christo
Served July 8, 1982
Case No. 808 Ida Warren
Served September 23, 1982
Case No. 810 Rose Blanchfield
Served September 23, 1982
Case No. 811 Olga Wright
Served September 23, 1982
Case No. 816 Andre Brown
Served September 23, 1982
Case No. 817 Charlotte Dennis
Served September 23, 1982
Case No. 828 Jack Cullen
Served September 23, 1982
Case No. 829 Judge Poppiti
Served September 23, 1982
Case No. 836 Richard Billings
Served September 23, 1982

there is a commingling of functions." We find these arguments to be without merit.

In *Withrow v. Larkin*, 421 U.S. 35 (1975), the United States Supreme Court rejected a physician's claim that proceedings before the medical examining board to revoke his license denied him due process of law because the same members both investigated and adjudicated the case. In *Withrow v. Larkin*, the Court stated:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.
>
> Very similar claims have been squarely rejected in prior decisions of this Court. *Id.* at 47.

In Nos. 204, 205 and 60, Kennedy has presented no evidence to overcome this presumption of honesty and integrity other than to say conclusively that the participation of a Board member who acts in an adjudicative or investigative role in one proceeding and in a judicial role in another proceeding involving different facts is a violation of due process. In effect, Kennedy asks this Court to hold that it is a *per se* violation of due process for the Board to combine its investigative and adjudicative functions where the combination does not occur

a recommendation for discipline based upon a finding of a disciplinary violation under the Code of Professional Responsibility. Therefore, Kennedy's first argument must fall.

Second, Kennedy's contention that he acted in good faith reliance on the advice of his attorney in not responding to interrogatories and depositions is not supported by the record. Unlike the situation in *In re Kennedy*, Del. Supr., 429 A.2d 987 (1981), where this Court upheld Kennedy's good faith challenge to production of records involving the Clients' Security Trust Fund, Kennedy completely ignored Rule 5 which was pertinent to this case and never sought a protective order from the full Board anytime during the five-month period between July 9, 1982, when he was served the earliest set of subpoenas and interrogatories in this matter, and December 8, 1982, when the hearing took place. Rather, he attempted to raise constitutional challenges to the discovery provision by petitioning this Court for a continuance on December 1, 1982 and upon denial of his request, raising them before the Board at the December 8, 1982 hearing. Based upon Kennedy's failure to adhere to the Rules as set forth by this Court, we find that he is barred from alleging a good faith argument in support of his position.

VIII

Having affirmed the findings of the Board, this court must now turn its attention to what disciplinary action, if any, must be taken to protect the public and uphold the integrity of the Bar. Generally, measures imposed for professional misconduct include private reprimand, public reprimand, suspension, and dis-